



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

DOCKET NO.: CWA-08-2004-0024

IN THE MATTER OF:

**ROBERT WHIPPLE
WHIPPLE MINOR SUBDIVISION**

Respondent

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FINAL ORDER

Pursuant to 40 C.F.R. § 22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order. The Respondents are hereby ORDERED to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondents of this Consent Agreement and Final Order.

12/23/03
DATE

SIGNED
Alfred C. Smith
Regional Judicial Officer



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)	
)	DOCKET NO. CWA-08-2004-0024
Robert Whipple)	
Whipple Minor Subdivision)	CONSENT AGREEMENT AND ORDER
)	
Respondents.)	

STATUTORY AUTHORITY

The United States Environmental Protection Agency ("EPA"), Region 8, and Robert Whipple ("Respondent"), through the undersigned representatives, hereby consent and agree as follows:

EPA and Respondent (collectively referred to as the "Parties") have agreed to settlement of this matter before the filing of a complaint as authorized by 40 C.F.R. § 22.13(b), and execute this Consent Agreement pursuant to 40 C.F.R. § 22.18(b)(2) and (3) to simultaneously commence and conclude the matter upon issuance of a final order.

EPA is authorized to issue civil administrative actions and assess civil penalties for violations of Section 301 of the Clean Water Act ("Act"), 33 U.S.C. § 1311, pursuant to Section 309(g) of the Act, as amended, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.13.

ALLEGATIONS

1. Respondent owns property in Big Sky, Madison County, Montana; however, Respondent permanently resides at 475 High Street, Mystic, Connecticut 06355.

2. At the time of the alleged violation, Respondent owned and controlled the Whipple Minor Subdivision and Summit View Subdivision in Big Sky Village (Site), located in Big Sky, Montana. The site is located in Section 20, Township 6 South, Range 3 East in, Madison County, Montana. The Site contained 2.5 acres of Palustrine wetlands, 0.41 acres of which have been filled and disturbed by Respondent's actions. The affected wetlands in this matter are specifically located and delineated on the map in Attachment 1.

3. On February 16, 1999, the U.S. Corps of Engineers (Corps), Helena Regulatory Office, received an application from Allied Engineering Services, Inc., on behalf of Respondent, for the construction of a pond in the vicinity of the unauthorized discharges. Respondent indicated at this time that no further wetland or stream discharges would occur in the development of the Site. On April 6, 1999, the Corps authorized the construction of the pond under Nationwide Permit Number 26.

4. During the summer of 2001 (approximately May and June), Respondent's agent, discharged earthen fill and graded in jurisdictional wetlands in five different locations, during road construction at the Site, using common earthmoving equipment.

5. In July, 2002, the Corps and EPA observed that unauthorized fill material had been placed in wetlands and waters of the United States. By letter dated August 1, 2002, the Corps stated that Respondent's actions described in paragraph 4 above, required prior Corps authorization and that the authorization applied for in 1999 did not apply to the work performed. Further, the Corps directed Respondent to "cease and desist" any further unauthorized work at the Site.

6. A wetland delineation done by O'Neil Bros. Hydrological Consulting (OBHC) over 4 days in late August and early September of 2002, concluded that there were five Palustrine wetlands on the property covering a total of 2.5. acres that were impacted by the work performed.

7. On May 1, 2003, OBHC submitted, on behalf of Respondent, a Corrective Action Plan to remove the unauthorized fill and restore the Site. The goal of the plan is to restore the wetlands by re-establishing soils, hydrology and vegetation in all disturbed areas to pre-violation conditions.

8. Since discharging the dredged or fill material described above, Respondent has not been authorized by any permit issued under the CWA Section 404, 33 U.S.C. § 1344, to allow the unauthorized discharges to remain.

9. The wetlands filled and disturbed by the unauthorized activities (the "affected wetlands") provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.

10. The fill material referenced in paragraph 4 above constitute "pollutants" within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).
11. The earthmoving equipment needed to move the fill material referred to in paragraph 4 above is a "point source" within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).
12. Respondent is a "person" within the meaning of CWA Section 502(5), 33 U.S.C. §1362(5).
13. The affected wetlands are "waters of the United States" within the meaning of 33 C.F.R. Section 328.3(a) and therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).
14. CWA Section 301, 33 U.S.C. § 1311, prohibits the discharge of a pollutant from a point source into waters of the United States by a person without a permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344.
15. Neither Respondent, nor Respondent's agent(s), has been authorized by a permit issued under CWA Section 404, 33 U.S.C. § 1344, to conduct the activities described in paragraph 4 above.
16. Respondent's activities as described in paragraph 4, above, without such a Section 404 permit, constitute violations of CWA Section 301, 33 U.S.C. § 1311.
17. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA has consulted with John Arrigo, of the Montana Department of Environmental Quality, regarding assessment of this administrative penalty by furnishing a copy of this Consent Agreement and inviting him to comment on behalf of the State of Montana.
18. Respondent has signed an Administrative Order on Consent to be issued pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), concurrently with this Consent Agreement and Final Order issued under Section 309(g) of the CWA, 33 U.S.C. § 1319(g). The Administrative Order on Consent provides for Respondent's return to compliance with the CWA through, among other things, restoring the wetland impacts alleged herein at the Whipple Minor Subdivision and Lot 2 of Summit View Subdivision in Big Sky Mountain Village described in paragraph

4, above, and seeking a Corps of Engineers permit authorizing past and proposed future discharges of dredged and fill material in the wetlands at the site.

TERMS OF SETTLEMENT

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication of any issue of fact or law, and upon consent and agreement of the Parties, it is hereby Ordered and Adjudged as follows:

19. Respondent admits the facts that allege fill was placed in waters of the U.S. and the jurisdictional allegations set forth above.

- a. Respondent waives its right to a hearing before any tribunal, to contest any issue of law or fact set forth in this Consent Agreement.
- b. This Consent Agreement, upon incorporation into a final consent order, applies to and is binding upon EPA and upon Respondent and Respondent's heirs, successors and assigns. Any change in ownership or status of Respondent, including, but not limited to, any transfer of assets or real or personal property, shall not alter Respondent's responsibilities under this agreement. This Consent Agreement contains all terms of the settlement agreed to by the parties.

20. Respondent consents and agrees to pay a civil penalty in the amount of (\$25,000), in the manner described below in this paragraph:

- a. Payment is due within 60 calendar days from the date written on the Final Consent Order, issued by the Regional Judicial Officer, that adopts this Consent Agreement. The date the payment is made is considered to be the date of receipt of the payment at the Mellon Bank described below. Payments must be received by 11:00 a.m. EST to be considered as received that day.
- b. The payment shall be made by remitting a cashier's or certified check, including the name and docket number of this case, for the this amount, payable to "Treasurer, United States of America," to:

Regular Mail:

Mellon Bank
Lockbox 360859
Pittsburgh, PA 15251-6859

Federal Express, Airborne, or other commercial carrier:

U.S. EPA, 360859
Mellon Client Service Center Rm 670
500 Ross Street
Pittsburgh, PA 15262-0001

Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004
TREAS NYC/CTR/
BNF=/AC-68011008

A copy of the check shall be sent simultaneously to:

Elyana Sutin
Legal Enforcement Program (8ENF-L)
U.S. EPA Region VIII
999 18th Street, Suite 300
Denver, CO 80202-2466

Tina Artemis
Regional Hearing Clerk (8RC)
U.S. EPA Region VIII
999 18th Street, Suite 300
Denver, CO 80202-2466

- c. In the event payment is not received by the specified due date, interest accrues from the date of the final consent order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received. (i.e., on the 1st late day, 61 days of interest accrues).

- d. In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 61st day from the date of the final consent order, and each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (i.e., the 151st day from the date the final consent order is signed). Payments are first applied to accrued interest, penalty and/or handling charge; the balance is then applied to the outstanding principal amount.
 - e. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.
21. Nothing in this Consent Agreement shall relieve Respondent of the duty to comply with the Clean Water Act and its implementing regulations.
22. Failure by Respondent to comply with any of the terms of this Consent Agreement shall constitute a breach of the consent agreement and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.
23. Nothing in this Consent Agreement shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this consent Agreement.
24. The undersigned representative of Respondent certifies that he/she is fully authorized to enter into the terms and conditions of this Consent Agreement and to bind the party he/she represents to the terms and conditions of this Consent Agreement.
25. The parties agree to submit this Consent Agreement to the Regional Judicial Officer, with a request that it be incorporated into a final consent order.
26. Each party shall bear its own costs and attorney fees in connection with this matter.
27. This Consent Agreement, upon incorporation into a final consent order by the Regional

Judicial Officer and full satisfaction by the parties, shall be a complete and full civil settlement of the specific violations alleged in the Complaint.

28. Pursuant to 40 C.F.R. § 22.45 (c)(3), this Consent Agreement is subject to public notice and comment.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,

Complainant.

Date: 12/19/03

By: SIGNED
Carol Rushin, Assistant Regional
Administrator, Office of Enforcement
Compliance and Environmental Justice

Date: 12.15.03

By: SIGNED
Elyana R. Sutin,
Enforcement Attorney
Legal Enforcement Program

ROBERT WHIPPLE
WHIPPLE MINOR SUBDIVISION

Respondent.

BY: SIGNED
Robert Whipple
Whipple Minor Subdivision

DATE: 12/10/03

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached CONSENT AGREEMENT/FINAL ORDER in the matter of ROBERT WHIPPLE, WHIPPLE MINOR SUBDIVISION, DOCKET NO.: CWA-08-2004-0024 was filed with the Regional Hearing Clerk on December 23, 2003.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Elyana Sutin, Enforcement Attorney, U.S. EPA - Region 8, 999 18th Street - Suite 300, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt on December 23, 2003, to:

Robert Whipple, Owner
Whipple Minor Subdivision
475 High Street
Mystic, CT 06355

December 23, 2003

SIGNED

Tina Artemis
Regional Hearing Clerk

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON DECEMBER 23, 2003.